

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,) MM Docket No. 99-215
FM Broadcast Stations,) RM-9337
(Mason, Menard and Fredericksburg, Texas)) RM-9892

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FEDERAL COMMUNICATIONS COMMISSION

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 28, 2000

Released: July 7, 2000

Before the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making in this proceeding, 14 FCC Rcd 9221 (1999). BK Radio, Jayson and Janice Fritz ("Fritz"), Foxcom, Inc., and Kent S Foster filed Comments. Munbilla Broadcasting Corporation ("Munbilla Broadcasting") filed a Counterproposal. BK Radio filed a Motion for Leave to File Comments on Counterproposal and Comments on Counterproposal. Fritz and BK Radio filed Reply Comments. Fritz filed a Motion to Dismiss Counterproposal, Munbilla Broadcasting filed an Opposition to Motion to Dismiss Counterproposal, and Fritz filed a Reply to Opposition to Dismiss Counterproposal. For the reasons discussed below, we are allotting Channel 239C2, Channel 273C2, and Channel 289C2 to Mason, Texas, and Channel 265C2 to Menard, Texas.

Background

2. At the request of BK Radio, the Notice proposed the allotment of Channel 239C2 to Mason, Texas, as a second local service. BK Radio is one of three mutually exclusive applicants for the Channel 249C2 allotment at Mason (File No. BPH-960823MF).¹ In the event Channel 239C2 is allotted to Mason, BK Radio would then amend its application to specify operation on Channel 239C2 without loss of cut-off protection. BK Radio notes that there are also alternate channels for both the Fritz and Foxcom applications. In response to the Notice, BK Radio and Fritz filed Comments supporting the allotment of Channel 239C2 to Mason and permitting BK Radio to amend its application without loss of cut-off protection. On the other hand, Foxcom filed Comments opposing any outcome that would permit BK Radio to amend its application and necessitate it to bid against Fritz for the remaining allotment. Foxcom also argues that a procedure which avoids an auction results in loss revenue to the treasury and therefore is not in the public interest. In its Counterproposal, Munbilla Broadcasting proposes the allotment of Channel 237C2 to Menard, Texas, as a first local service. Munbilla Broadcasting also proposes the substitution of Channel 273C2 for Channel 249C2 at Mason, and the allotment of Channel 249C2 to Frederick, Texas, as a second local service. Finally, Kent S. Foster filed Comments expressing his interest in a Channel 239C2 allotment at Mason.

¹ The other two applicants for the Channel 249C2 allotment at Mason are Jayson D. Fritz and Janice M. Fritz (File No. BPH-960826MS) and Foxcom, Inc. (File No. BPH-960826MH).

3. At the outset, we can not favorably consider the Munbilla Broadcasting proposal to allot Channel 249C2 to Fredericksburg, Texas. Such an allotment would have required each of the applicants for the Channel 249C2 allotment at Mason to amend their respective applications to specify operation on Channel 273C2. However, a proposal to operate on Channel 273C2 at the sites specified in the respective applications at Mason would not comply with the separation requirements set forth in Section 73.207(b) of the Rules. As such, we will not consider this aspect of the Munbilla Broadcasting Counterproposal. See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 8 FCC Rcd 4743, n.12 (1993). On the other hand, we are allotting alternate Channel 265C2 to Menard, Texas, as a first local service.²

4. There is a second reason not to favorably consider the proposed Channel 249C2 allotment at Fredericksburg. Fritz filed a Motion to Dismiss Counterproposal and BK Radio filed Comments on Counterproposal. Both pleadings concern the fact that the proposed Channel 249C2 allotment at Fredericksburg is short-spaced to an earlier and cut-off Counterproposal filed by Sonoma Media Corporation and Gulfwest Broadcasting Company in MM Docket No. 98-198. That Counterproposal proposed the substitution of Channel 249C2 for Channel 249C3 at Cuero, Texas, reallocation of Channel 249C2 to Luling, Texas, and modification of the Station KVCQ license to specify operation on Channel 249C2 at Luling.³

5. In its Opposition, Munbilla Broadcasting recognizes that its Fredericksburg proposal is in conflict with the Luling Counterproposal in MM Docket No. 98-198. However, Munbilla Broadcasting contends that the Luling Counterproposal was not in compliance with Commission requirements and, therefore, should not preclude subsequent rulemaking proposals. Specifically, Munbilla Broadcasting argues that the Luling Counterproposal was not in compliance with the Columbus policy⁴, short-spaced to Station KBAE, Channel 284C3, Llano, Texas, one of the proposed alternate channel substitutions at San Saba, Texas, necessary to effectuate the Luling proposal. As such, Munbilla Broadcasting contends that the proposed allotment to Luling does not comply with Commission spacing requirements, and it would not be in the public interest.

6. Contrary to the Munbilla Broadcasting assertion, the Luling Counterproposal was not void ab initio and was entitled to protection from subsequently filed rulemaking proposals. While the purported defects in the Luling Counterproposal may have eventually precluded favorable consideration, it was entitled to consideration in the context of MM Docket No. 98-198 along with all other timely proposals.

² The reference coordinates for the Channel 265C2 allotment at Menard, Texas, are 30-44-00 and 99-44-00.

³ In a Report and Order in MM Docket No. 99-357, released May 26, 2000, (DA 00-1165), we substituted Channel 249C1 for Channel 249C3 at Cuero, reallocated Channel 249C1 to McQueeney, Texas, and modified the license of Station KVCQ to specify operation on Channel 249C1. According to the licensee of Station KVCQ, this action supercedes the earlier proposal for a reallocation to Luling.

⁴ In Columbus, Central City, Crookston, Kearney, Lexington, McCook and Valentine, Nebraska, and Hill City, Kansas, 59 RR2d 1184 (1986), the Commission stated that in the absence of "significant public interest benefits, or an assurance of agreement among affected stations" prior to the filing of a petition for rule making, we would not entertain rulemaking proposals involving more than two channel substitutions in the FM Table of Allotments by existing stations. In this instance, the Luling reallocation proposal would have required more than two channel substitutions because the licensee of Station KBAE, San Saba, Texas, withdrew its agreement for the channel substitution.

During the time of that consideration, we see no public interest benefit or benefit to the efficient processing of rulemaking petitions, to accept or consider untimely proposals contingent on the outcome of a particular proposal. None of the alleged defects in the Luling Counterproposal warrant departure from this policy. Whether or not a reallocation of Channel 249C2 to Luling, Texas, would have "significant public interest benefits" to justify multiple channel substitutions under Columbus would have been an issue to resolve in a rulemaking proceeding. Similarly, we would not have summarily dismissed the Luling Counterproposal because of a conflict with the Channel 284C3 allotment at Llano, Texas. In this regard, we note that on May 30, 1997, we deleted this allotment. 12 FCC Rcd 6809 (1997). Thereafter, on December 18, 1998, we denied a Petition for Reconsideration directed to that action. 13 FCC Rcd 25039 (1998). On December 21, 1998, Gulfwest Broadcasting Company and Sonoma Media Corporation filed the Luling Counterproposal. Finally, the fact that one of the suggested alternate channels at San Saba did not comply with Section 73.207(b) of the Rules or the fact that the underlying Luling Counterproposal may have been ultimately found not to be in the public interest does not warrant considering a contingent counterproposal in another proceeding as suggested by Munbilla Broadcasting. All four defects suggested by Munbilla Broadcasting are appropriately considered in the context of MM Docket No. 98-198.

7. As requested, we are allotting Channel 239C2 to Mason, Texas.⁵ BK Radio may amend its pending application to specify operation on Channel 239C2 at the new site without loss of cut-off protection. We are also allotting Channel 289C2 to Mason and permitting Fritz to amend their application to specify operation on Channel 289C2 without loss of cut-off protection.⁶ In addition, we are allotting Channel 273C2 to Mason, Texas, and permitting Foxcom to amend its application to specify operation on Channel 273C2 without loss of cut-off protection.⁷ Finally, as result of the expression of interest in a Class C2 allotment filed by Kent S. Foster, we are allotting Channel 281C2 to Mason for general application.⁸

8. As noted by Munbilla Broadcasting, we recognize that allotting additional channels to Mason will obviate the need for an auction and may result in a loss of revenue to the United States Treasury. However, we note that each of these applicants could have instituted a separate proceeding to allot a channel and thereby achieved the same result. On balance, we do not see any overriding public interest benefit to expend Commission resources to process additional rulemaking proceedings and delay service to the public on the basis of possible auction revenue at some time in the future.

9. Accordingly, pursuant to authority contained in Sections 4(I), 5©(1), 303(g) and © and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective September 5, 2000, the FM Table of Allotments, Section 73.202(b) Of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

⁵ The reference coordinates for the Channel 239C2 allotment at Mason, Texas, are 30-33-24 and 99-25-34.

⁶ The reference coordinates for the Channel 289C2 allotment at Mason, Texas, are 30-31-40 and 99-07-51.

⁷ The reference coordinates for the Channel 273C2 allotment at Mason, Texas, are 30-38-21 and 99-20-36.

⁸ We recognize that in an earlier Report and Order in MM Docket No. 99-357, DA 00-1165, released May 26, 2000, we allotted Channel 281C2 to Mason and permitted each of the applicants to amend their respective applications to specify operation on Channel 281C2 without loss of cut-off protection. As discussed above, these applicants will now amend their applications to different channels. Channel 281C2 will be available for general application at the Mason city reference site. The coordinates for the Channel 281C2 allotment at Mason, Texas, are 30-44-55 and 99-13-49.

CommunityChannel No.

Mason, Texas

239C2, 273C2, 289C2, 281C2

Menard, Texas

265C2

10. A filing window for the Channel 265C2 allotment at Menard, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau , (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Allocations Branch
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